

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JABBAR PRIEST BULLS,

Defendant-Appellant.

UNPUBLISHED

September 25, 1998

No. 202149

Genesee Circuit Court

LC No. 96-054768 FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERANCE LASEAN HILL,

Defendant-Appellant.

No. 202849

Genesee Circuit Court

LC No. 96-054774 FC

Before: Murphy, P.J., and Gribbs and Gage, JJ.

PER CURIAM.

Following a joint jury trial, defendant Bulls was convicted of first-degree murder, MCL 750.316(1)(b); MSA 28.548(1)(b), assault with intent to rob while armed, MCL 750.89; MSA 28.284, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant Hill was convicted of second-degree murder, MCL 750.317; MSA 28.549, and assault with intent to rob while armed, MCL 750.89; MSA 28.284. Bulls was sentenced to life imprisonment, without parole, for the first-degree murder conviction, twenty-five to fifty years' imprisonment for the assault with intent to rob while armed conviction and two years' imprisonment for the felony-firearm conviction. Hill was sentenced to life imprisonment for the second-degree murder conviction and fifteen to thirty years' imprisonment for the assault with intent to rob while armed conviction. Defendants now appeal as of right. We affirm.

Defendants first argue that the trial court erred in admitting their unredacted, out-of-court statements in their joint trial. We review a trial court's decision to admit evidence under the abuse of discretion standard. *People v McMillan*, 213 Mich App 134, 137; 539 NW2d 553 (1995). An abuse of discretion exists when the court's decision is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

For a nontestifying codefendant's statement to be admissible against a defendant, it must not violate the defendant's constitutional right to confront his accuser and must be admissible under the Michigan Rules of Evidence. *People v Poole*, 444 Mich 151, 157; 506 NW2d 505 (1993). If the hearsay statement of the nontestifying codefendant would be admissible under a "firmly rooted" exception to the hearsay rule, the Supreme Court has determined that it also complies with the requirements of the Confrontation Clause. *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980). Alternatively, if no "firmly rooted" exception applies, the statement may still be admissible if it presents "particularized guarantees of trustworthiness." *People v Richardson*, 204 Mich App 71, 74; 514 NW2d 503 (1994). The reliability of evidence can be inferred where the statement falls within a firmly rooted hearsay exception. *People v Spinks*, 206 Mich App 488, 491-492; 522 NW2d 875 (1994). "However, reliability may not be inferred from the blanket categorization of a statement as being against penal interest." *Id.* at 492.

It is undisputed that the challenged statements were hearsay. However, pursuant to MRE 804(b)(3), those portions that are against the declarant's own penal interest are admissible, while those portions that inculcate a defendant other than the declarant are admissible only if the circumstances under which the statement was made vouch for its reliability. *Id.* Statements made to the police while under custodial interrogation are generally not reliable since they may be motivated by a desire to win favorable treatment. *Id.*

We start with the presumption that the statements are unreliable. The prosecution emphasizes the similarity in content between Hill's and Bulls' statements to argue that the statements are reliable. However, this is not a factor in determining error, but rather in determining whether such error was harmless. *Richardson, supra* at 75-76. We find that Bulls' statements implicating himself were clearly against his penal interest since they detailed his involvement in the proposed robbery and subsequent death of the victim. However, the "carry-over" portions of Bulls' statements that implicate Hill as the look-out only fall within the hearsay exception if they were "made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry." *Id.* at 76-77. One of the primary considerations in applying the penal interest exception to such carry-over statements is whether the declarant made the statements while in custody, motivated by a desire to curry favor with the authorities. *Id.*

Although Bulls made his statements concerning Hill while in custody, the record is devoid of any indication that Bulls was motivated to make the statements by a desire to curry favor from the authorities. Further, Bulls' statements have several indicia of reliability in that they do not minimize his role or responsibility in the crime, they were voluntarily given, and they were not motivated by a desire to lie or distort the truth regarding Hill's involvement in the crime. Accordingly, we conclude that the

carry-over portions of Bulls' statements implicating Hill fall within the penal interest exception to the hearsay rule and have sufficient indicia of reliability to satisfy Confrontation Clause concerns. Thus, the trial court did not err in admitting the statements against Hill.

Hill's statements, on the other hand, tended to shift blame by inculcating others more than himself. Hill described his role as minor, and his statements remove him from the crime scene prior to the murder of the victim. In addition, Hill's statements were made in response to custodial interrogation and during plea negotiations, and therefore, Hill may have been motivated by a desire to receive favorable treatment from the police and the prosecutor. Accordingly, we find that Hill's statements implicating Bulls do not fall under the penal interest exception and lack sufficient indicia of reliability to satisfy Confrontation Clause concerns. Thus, the trial court erred in admitting Hill's statements as substantive evidence against Bulls.

Although the trial court erred in admitting Hill's statements against Bulls, we conclude that the error was harmless. An error is not harmless if the exclusion of the accomplice's statement would have resulted in a jury finding the prosecution's case significantly less persuasive. *Spinks, supra* at 493. In this case, Bulls' own confessions were equally detailed and as devastating as Hill's statements. Specifically, Bulls confessed to participating in the robbery with Hill and another accomplice and admitted that he knew that the other accomplice possessed a shotgun. Because malice is a permissible inference from the use of a deadly weapon, *People v Turner*, 213 Mich App 558, 567, 572-573; 540 NW2d 728 (1995), a reasonable jury would have reached the same verdict on the basis of Bulls' confession alone.

In addition, Bulls argues that insufficient evidence was presented to support his conviction for felony-firearm. In reviewing the sufficiency of the evidence in a criminal case, we view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). In engaging in this analysis, we will not interfere with the jury's role of resolving questions of credibility and intent. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988).

In order to establish the crime of felony-firearm, the prosecutor must prove that Bulls possessed a firearm during the commission or while attempting to commit a felony. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). Or, since Bulls did not actually possess the firearm, to convict him as an aider and abettor, the prosecution must prove that Bulls aided and abetted either the acquisition or the retention of the firearm. *People v Eloby (After Remand)*, 215 Mich App 472, 478; 547 NW2d 48 (1996). The prosecution does not have to prove that Bulls had advance knowledge that Matthews was likely to injure or kill the victim. Rather, "the Legislature's intent in drafting the felony-firearm statute was to provide for an additional felony charge and sentence whenever a person possessing a firearm committed a felony other than those four explicitly enumerated in the felony-firearm statute." *People v Mitchell*, 456 Mich 693, 698; 575 NW2d 283 (1998). Circumstantial evidence and the reasonable inferences which arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996).

Viewing the evidence in the light most favorable to the prosecution, we conclude that the prosecution presented sufficient evidence for the jury to find that the essential elements of aiding and abetting felony-firearm were proven beyond a reasonable doubt. Bulls stated, in both a formal and informal statement to police, that after he had told Matthews of his encounter with the victim, he had asked Matthews whether he had a gun. In response to Bulls' question, Matthews left the room and returned with a shotgun. Afterward, Matthews and Bulls discussed robbing the victim. Contrary to Bulls' argument, the prosecution did not have to show that Bulls knew Matthews would injure or kill the victim. Rather, the prosecution had to show that Bulls aided and abetted in the acquisition or the retention of the gun which was used during the commission of a felony, *Eloby, supra*, which it did through Bulls' own statements.

Hill argues that the trial court abused its discretion when it refused to allow him to plead guilty pursuant to a plea agreement. We disagree. MCR 2.401 allows the trial court to set time limitations for the processing of a case. *People v Grove*, 455 Mich 439, 464; 566 NW2d 547 (1997). MCR 6.002 requires that the court rules be construed to eliminate unjustifiable delay and recognizes the trial court's authority to control its own docket. *Id.* at 464-465. The trial court has the authority and the discretion to manage its dockets. *Id.* at 470.

Trial was originally scheduled to begin on January 14, 1997, but was adjourned to allow for further plea negotiations. On January 15, 1997, the parties appeared before the trial court and indicated that plea negotiations were ongoing. Hill's attorney indicated that the parties had reached a plea agreement which was contingent on Hill passing a polygraph test. The prosecutor indicated that any further plea negotiations were dependent on whether Hill passed a polygraph exam. On January 16, 1997, Hill's attorney indicated that Hill had failed the polygraph exam, but that the parties might be able to negotiate another plea if Hill could pass a second polygraph test. Hill's attorney indicated that Hill could enter a plea, but it might have to be withdrawn if Hill failed the second polygraph. The prosecutor stated that plea negotiations were not ongoing and that he was ready to proceed to trial.

We find nothing in the record to indicate that the trial court abused its discretion in deciding to begin trial. Defendant Hill had had several opportunities to plead guilty. In fact, if he had passed his first polygraph test, the plea agreement would have been negotiated before the start of trial. Defendant did not have the right to delay the start of trial further to allow for further negotiations, particularly in light of the prosecution's statement that negotiations were not ongoing. Because the trial court had the right to manage its docket and defendant has received the right to a fair trial of the offense charged, we find no abuse of discretion in the trial court's decision to proceed with trial.

Finally, Hill argues that he was denied the effective assistance of counsel when his trial attorney failed to object to the trial court's rejection of Hill's conditional guilty plea. To establish ineffective assistance of counsel, a defendant must show that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defense counsel, however, is not required to argue a frivolous or meritless motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

In this case, Hill's attorney was able to delay the start of trial two days to allow further plea bargain negotiations. On January 16, 1997, defense counsel argued for a further delay or for the entry of a plea that was contingent on defendant passing a polygraph test, since the agreement previously reached had been abandoned when Hill failed the first polygraph exam. The prosecutor stated that no plea negotiations were ongoing. The trial court, in its discretion, decided not to delay the trial further. Any continuing argument with the judge that if the trial was delayed the parties would reach an agreement, would have been meritless. Therefore, because defense counsel is not required to argue a meritless motion, Hill was not denied the effective assistance of counsel.

Affirmed.

/s/ William B. Murphy

/s/ Roman S. Gibbs

/s/ Hilda R. Gage